

DECISION

OAL DKT. NO. HEA 9669-15

AGENCY DKT. NO. HESAA

**NEW JERSEY HIGHER EDUCATION
STUDENT ASSISTANCE AUTHORITY
(NJHESAA),**

Petitioner,

v.

DUSTIN ZIRBSER,

Respondent.

Kortney Swanson Davis Esq., for petitioner (Schachter & Portnoy,
attorneys)

Dustin Zirbser, respondent, pro se, appearing on the papers

Record Closed: August 13, 2015

Decided: September 16, 2015

BEFORE **JOSEPH LAVERY**, ALJ t/a:

STATEMENT OF THE CASE

The **New Jersey Higher Education Student Assistance Authority (NJHESAA, the agency)**, **petitioner**, acting under authority of 20 U.S.C.A. Sec. 1095(a) and (b) and 34 C.F.R. 682.410(b)(9) moves to impose an administrative wage garnishment on income of respondent.

Respondent, Dustin Zirbser opposes this action on appeal.

Today's decision affirms the right to garnish the wages of respondent Dustin Zirbser in amount not to exceed 15 percent of disposable wages.

PROCEDURAL HISTORY

This matter was filed on June 30, 2015, in the Office of Administrative Law (OAL) by the agency head for hearing. The Acting Director and Chief Administrative Law Judge on July 14, 2015, ordered that this case be heard before the undersigned, temporarily appointed on recall. Hearing convened on August 13, 2015, and on that date the record closed.

ANALYSIS OF THE RECORD

Background:

The material facts in this matter are not in dispute:

Respondent, Dustin Zirbser, signed a Federal Stafford Loan Promissory Note on August 22, 2006. On this basis, Wachovia Education Finance disbursed

to him \$11,736 (Exhs. P-1, P-2). In time, respondent defaulted on his regularly-scheduled repayments to the lender. The latter then filed a claim (Exh. P-3) to be reimbursed by the legal guarantor for the principal and interest then owed. The total requested was \$18,209.52. The guaranteeing agency, NJHESAA, petitioner here, complied by issuing a check to the lender in that amount on January 22, 2015 (Exh. P-4).

Eventually, respondent failed to make payments to the agency, as well (Exh. P-5). Consequently, on April 23, 2015, NJHESAA notified respondent of its intent to garnish (Exhs. P-6, P-7). Respondent replied with a request to be heard (Exh. P-8), grounding his petition from the agency's intended garnishment on the effect this would have. In his request form, he stated that garnishment of 15 percent of his disposable wages would impose an extreme financial hardship. He did not believe he could afford such payments.

In reply, the agency then forwarded to him a financial statement form (Exh. P-9) to complete. Respondent thereafter provided the data. He explained that "Money is tight at this time," because his wife was not working and they were helping their daughter with the raising of their grandchild. The total adjusted gross income listed on respondent's income tax return for 2014, filed jointly with his wife, amounted to \$85,983. Ibid.

The agency reviewed respondent's calculations and concluded that 15 percent was an appropriate deduction. **Aurea Thomas**, Senior Investigator testified for the agency to tell why. She adopted the testimony in Janice Seitz's affidavit, confirming her own personal experience with the case. Ms. Thomas pointed out that the monies left unpaid were set at \$250 per month. This amounted to less than 15 percent of respondent's total wages. Several telephone inquiries to his home had been unsuccessful. Consequently, the agency is without knowledge of any other aspects of his circumstances than what he has described in documents submitted.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact:

I **FIND** that there are no disputes involving facts material to a decision here.

Conclusions of Law

Burden of Proof:

The burden of persuasion falls on the agency in enforcement proceedings to prove violation of administrative regulations, Cumberland Farms, Inc. v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987). The agency must prove its case by a preponderance of the credible evidence, which is the standard in administrative proceedings, Atkinson v. Parsekian, 37 N.J. 143 (1962). Precisely what is needed to satisfy the standard must be decided on a case-by-case basis. The evidence must be such as to lead a reasonably cautious mind to a given conclusion, Bornstein v. Metropolitan Bottling Co., 26 N.J. 263 (1958). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power, State v. Lewis, 67 N.J. 47 (1975). Credibility, or more specifically, credible testimony, in turn, must not only proceed from the mouth of a credible witness, but it must be credible in itself, as well, Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954).

Applying the law to the facts:

Under authority of the provisions of 20 U.S.C.A. Sec. 1095(a) and (b) and 34 C.F.R. 682.410(b)(9)(i)(M) and (N), hearing was held before the undersigned.

During this proceeding, the agency, NJHESAA, was required to show by a preponderance of evidence: (a) that the debt exists, (b) that it exists in the amounts the agency has calculated, and (c) that the debtor is delinquent. This the agency has done. The testimony of its witness was credible and supported by the unchallenged proffer of Exhibits P-1 through P-10, and as well by the data shown in respondent's exhibits, R-1 and R-2, all now in evidence.

The ameliorating circumstances claimed by respondent in his Request for Hearing Form create an affirmative defense. It is respondent who therefore has the burden of persuasion. He must show that both facts and law compel a retreat by the agency from its request to initiate garnishment. This respondent has *not* done. It is plain that the terms of the promissory note and the enabling legislation (the Act) creating NJHESAA compel the agency's exercise of its authority to recover expended public funds.

Consequently, it is a fair construction of the Act and implementing rules that the agency is now entitled to be made whole. To achieve such "wholeness," repayment should be compelled through garnishment. The garnishment should go forward by adding the amounts of respondent's unpaid principal and capitalized interest to the mathematical mix of factors the agency normally employs when computing remaining monthly schedules of payment. These added amounts would be spread over the life of the loan. The goal must be to assure complete repayment of the entire loan within that number of years for which repayment was originally contracted.

Such an apportionment of payments here may or may not reach the monthly cap of 15 percent of disposable wages which now is suggested by the agency as most appropriate. Notwithstanding, the decisive consideration must be otherwise. There is an absence of any ineluctable compulsion in law or rules which demands immediate, automatic move to garnish at the monthly maximum of 15 percent of disposable income simply by reason of past non-payment. Further consistent with this view is the lack of legislative intent to be found in the

Act or in the cited rules to automatically garnish the maximum by way of *penalty* for a borrower's non-compliance (the agency likewise denies that intent). Consequently, NJHESAA should reach the monthly garnishment figure it seeks by adherence to the normal course. It must rely on whatever uniform assessment calculation procedure it customarily follows when administering the Act. As noted above, this process may, or may not reach the 15 percent legal maximum.

ORDER

I **ORDER**, therefore, that the amount defined of record as owed by respondent and sought by petitioner NJHESAA, plus accrued interest and fees, be recovered by garnishment consistent with the above reasoning. However, the monies deducted for any pay period shall be at no more than 15 percent of disposable wages. 20 U.S.C.A. 1095(a)(1).

This decision is final pursuant to 34 C.F.R. § 682.410(b)(9)(i)(N) (2010).

September 16, 2015
DATE

JOSEPH LAVERY, ALJ

Date Received at Agency

Date Mailed to Parties:

LIST OF WITNESSES:

For petitioner:

Aurea Thomas

For respondent:

None

LIST OF EXHIBITS IN EVIDENCE:

For petitioner NJHESAA:

- P-1 Affidavit of Janice Seitz, dated June 18, 2015
- P-2 Federal Stafford Loan Promissory Note, dated August 22, 2006
- P-3 Claim Form submitted by lender
- P-4 Default computer screen NJHESAA, dated June 25, 2015
- P-5 Non-payment history: Dustin J. Zirbser
- P-6 Correspondence computer screen: NJHESAA to Dustin J. Zirbser
- P-7 Notice of Intent to Garnish form (blank)
- P-8 Request for Hearing form: Dustin J. Zirbser, dated May 6, 2015
- P-9 Financial Statement form, NJHESAA (blank)
- P-10 Completed Financial Statement form: Dustin J. Zirbser, received June 1, 2015, with attachments (2).

For respondent:

- R-1 Letter to whom it may concern: Dustin J. Zirbser, dated May 29, 2015 (original)
- R-2 Earnings Statement: Dustin J. Zirbser, undated (original)